THE DUTY TO BARGAIN IN GOOD FAITH

- THE FIRST THREE YEARS

Address Given To

Conference on Employer's Freedom of Action
in the Collective Bargaining Process

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Donald D. Carter
Chairman
Ontario Labour Relations Board

Professor (on leave)
Faculty of Law
Queen's University

NOTE: FOR COPIES OF CASES CITED
IN THIS SPEECH SEE CASEBOOK
FILE -- CASEBOOK #10

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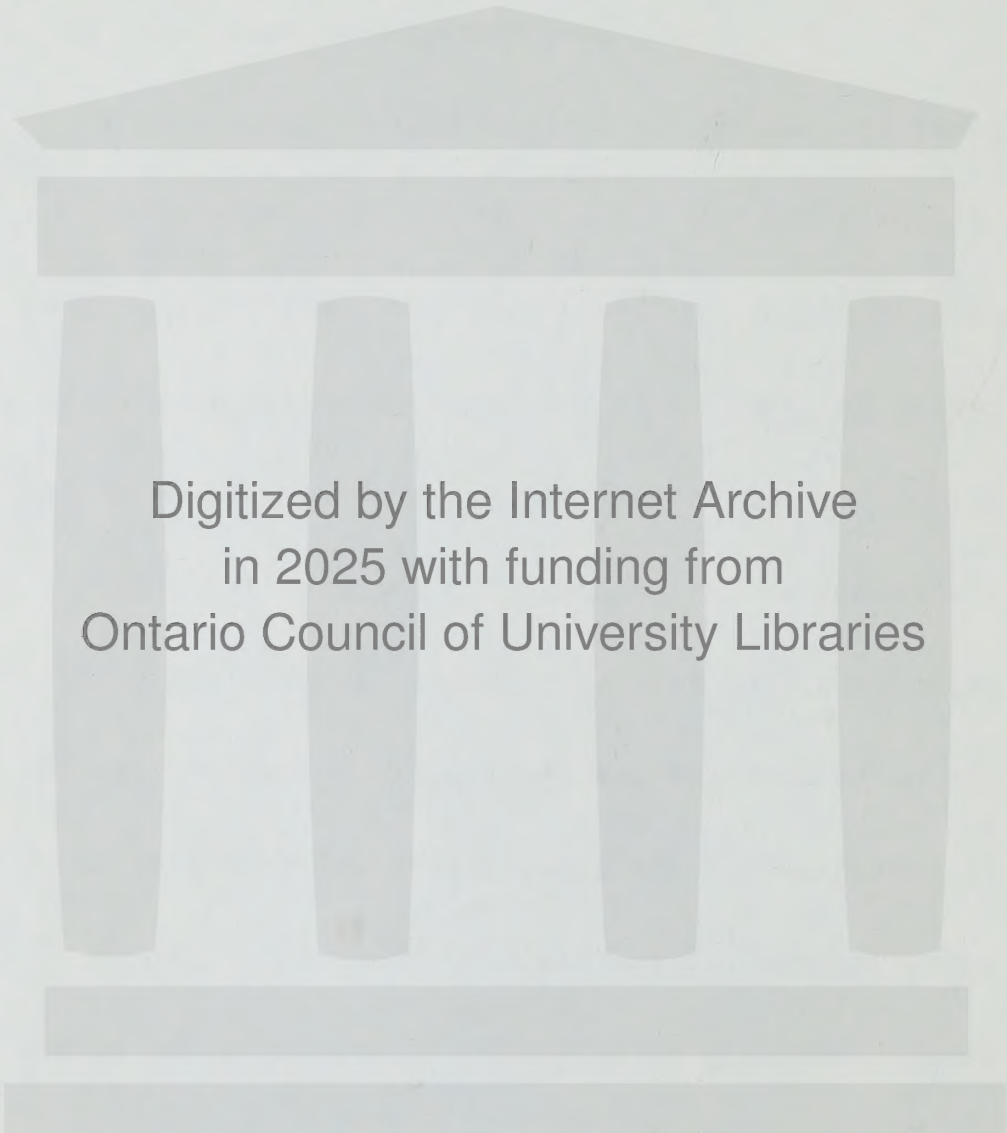
One of the more interesting tasks that has faced the Labour Board since July 1975 has been to interpret and apply the statutory duty to bargain in good faith. Following the 1975 amendments to the Labour Relations Act, the Board found itself with an extended remedial jurisdiction over bargaining conduct, the result of the amendment to section 79 of the Act permitting, not just individuals, but employers and unions to seek redress for a contravention of the Act. The extension of the general remedial provision now makes it possible for bargaining complaints to be brought directly to the Board, confronting the Labour Board with the difficult task of determining the content of the duty to bargain in good faith and fashioning the appropriate relief to remedy any breach of this duty.



For all practical purposes the Board began this task with a clean slate. Prior to the extension of its remedial jurisdiction in 1975, the Board had dealt with bargaining complaints only in the context of an application for consent to prosecute. The role of the Board was confined to determining whether an applicant had made out a prima facie case or whether the application gave rise to an arguable point of law. As a general rule, the Board when granting consent to prosecute a bargaining complaint followed the practice of not commenting upon the evidence before it because of a concern that such comment might adversely affect the subsequent proceedings in Provincial Criminal Court. The result of the Board's reticence to comment upon bargaining complaints was a singular lack of Board jurisprudence defining the statutory duty to bargain in good faith.

Although complainants were free to prosecute a bargaining complaint in the Provincial Criminal Court once the Board had granted consent, few of these complaints ever reached the courts. The reasons for this lack of follow-up are not entirely clear. Perhaps complainants found the criminal prosecution to be too slow and costly; perhaps they found the sanction available from the Courts, a monetary fine payable to the Province, to be an inadequate remedy; or perhaps they found the publicity to be reaped from obtaining a consent to prosecute from the Board to be more useful than any subsequent prosecution. In any event, few cases reached the Courts with the result that the duty to bargain in good faith was left largely undefined in that forum as well.

As of 1975 the development of the duty to bargain in good faith in Ontario was at a most rudimentary stage, the jurisprudence consisting of a

mere handful of Court and Board decisions. By contrast, in the United States, there was in place a sophisticated and well-developed body of case law - N.L.R.B. decisions, decisions of the Federal Courts, and decisions of the United States Supreme Court - exploring the full implications of the duty to bargain in good faith. The recent amendment of the Ontario Labour Relations Act has now placed the task of defining the duty to bargain in good faith primarily in the hands of the Labour Relations Board, providing the Board with the opportunity to fashion a concept of good faith bargaining for Ontario.

I would be less than frank if I did not say that the articulation of the duty to bargain in good faith has not been an easy task for the Board. The collective bargaining exercise has been widely regarded as an economic exercise where the final result is largely dictated by the relative economic strength of the parties. Given a situation where both parties are attempting to

assert their own self-interest, it can be legitimately asked whether a notion of good faith has any relevance to the conduct of collective bargaining. The answer to this paradox is that collective bargaining is just as much an exercise in human relations as it is an economic exercise. It is the human relations aspect of the collective bargaining process that provides the justification for the imposition of the legal concept of a duty to bargain in good faith.

This point is hardly novel, having been recognized from the very inception in Ontario of a statutory scheme of collective bargaining. One must draw the conclusion from the longstanding existence of the duty to bargain in good faith that the Legislature intended that it be more than a pious hope, and that there be some regulation of the collective bargaining exercise. The existence of a duty to bargain in good faith is a recognition of the fact that certain

bargaining practices, because they are destructive of the collective bargaining process itself, must be prevented.

The Board has been faced with a particular dilemma when considering the extent of the duty to bargain in good faith. The Board has a clear statutory responsibility to give meaning to the duty to bargain in good faith yet, on the other hand, is aware that it should not interpret the duty so as to restrict the give and take of the collective bargaining process. The Board has been faced with this dilemma in a number of bargaining complaints that have arisen during the last three years. The resulting decisions now form the nucleus of a jurisprudence articulating, in some measure, the extent of the duty to bargain in good faith and the extent of the Board's power to remedy only breaches of this duty. The jurisprudence, however, is far from complete and continues to evolve on a case-by-case basis.

The first significant decision following the 1975 amendments was DeVilbiss (Canada) Ltd., [1976] Rep. Mar. 49. There an employer and a union were unsuccessfully negotiating a first agreement. On the facts the Board found that the conduct of the employer amounted to a scheme to undermine the negotiations. Of particular concern to the Board was the employer's reluctance to meet with the union, its refusal to supply the union with existing wage and classification information, its unilateral alteration of terms and conditions of employment during negotiations, and its discriminatory treatment of the members of the union bargaining committee. By way of remedy the Board directed the employer to pay to members of the union's negotiating committee certain benefits which they should have received, and to provide to the union the wage data requested at the outset of the negotiations. The Board, however, refused to direct the employer to enter a collective agreement containing

the terms already implemented unilaterally by the employer during negotiations, considering that particular remedy to be inappropriate in the circumstances. Left undecided was the question of whether the Board's remedial jurisdiction was sufficiently extensive to allow it to impose a collective agreement upon the parties—an issue that was to be addressed directly in the Ottawa Journal case a year later.

The DeVilbiss decision introduced an aspect of the duty to bargain in good faith that would be the subject of further elaboration in subsequent Board decisions. The Board made it clear that the duty to bargain in good faith related not only to the obligation of an employer under the Act to recognize a trade union once it had lawfully acquired bargaining rights, a problem occurring in first-agreement situations such as in DeVilbiss, but that it also required bargaining parties to engage in a full and rational discussion of their

bargaining differences. This duty to engage in a full discussion was to become the predominant theme running through the decisions that followed.

The cases that followed DeVilbiss were not first-agreement situations involving the question of union recognition but, rather, these cases involved more mature bargaining situations where a breakdown of negotiations had occurred. Defining the limits of the duty to bargain in good faith in this type of case proved to be much more difficult than in the cases of non-recognition where tactics destructive of the bargaining process were usually more apparent.

In Canadian Industries Ltd., [1976] OLRB Rep. May 199, the Board was faced with a bargaining complaint arising out of a more mature bargaining relationship. In these negotiations the employer, although certainly recognizing the trade union as bargaining agent, had taken the stance that it would

not discuss or consider a monetary package in excess of the arithmetic guidelines under the Anti-Inflation Act. The Board held that the employer by adopting its own interpretation of the guidelines, and indicating its unwillingness to discuss any other interpretations, had foreclosed the full discussion required by the statutory duty to bargain in good faith. The interesting aspect of the C.I.L. decision is the emphasis placed by the Board on the second branch of the duty to bargain in good faith - the requirement to engage in full and rational discussion at the bargaining table.

The requirement of full and rational discussion emerged again in two decisions that followed the C.I.L. case. In St. Joseph's Hospital, [1976] OLRB Rep. June 255, the Board was required to approach the perilous shoals of hospital bargaining. Negotiations between a number of hospitals and the

Canadian Union of Public Employees had reached an impasse, and the Board was confronted with an application from the hospitals alleging a threatened illegal strike, and an application from the union alleging a failure to bargain in good faith. The Board issued certain orders restraining strike action, and then proceeded to deal with the bargaining problem. The Board held that the union was entitled to be apprised of not only the factors which determined the compensation offer but also the supporting rationale and that in the special area of hospital bargaining, where the purse strings are ultimately controlled by the government, there was some obligation on the hospitals to bring to the attention of the government the position of the union.

Again, in Pine Ridge District Health Unit, [1977] OLRB Rep. Feb. 65, the Board had to consider a bargaining dispute arising out of what might be

called the quasi-public sector. This dispute was between a bargaining unit of public health nurses and a local Board of health. The Board made it clear that a mere lack of tact in negotiations did not breach the duty to bargain in good faith. Of more interest, however, is its finding that the employer had not met the duty to bargain in good faith by "failing to explain in any meaningful way the rationale of its final position on wages".

These three cases indicate the Board's concern that collective bargaining not be carried out in the dark. Mutual communication is an essential element of the duty to bargain in good faith reflecting the Board's concern that negotiations not break down because of a lack of understanding of the positions taken at the bargaining table. This emphasis upon mutual communication does not mean that the parties must go through the motions of bargaining for the

sake of appearances. What it does mean is that the bargaining parties must meet and make an honest effort to communicate with each other.

This point is best illustrated by citing some specific incidents that the Board has held to be a breach of the duty to bargain in good faith: a tabling of additional demands by a party after a dispute had been defined (Graphic Centre, [1976] OLRB Rep. May 221); the unilateral break-off of negotiations by a party because of an outstanding dispute under the expiring collective agreement (Ottawa Journal, [1977] OLRB Rep. June 309); an insistence by one party on discussing one issue to the exclusion of all others (Ottawa Journal, supra); an attempt to bargain directly with employees (A.N. Shaw Restoration Ltd., Board File No. 1918-77-U, and, most recently, a refusal to sign a collective agreement where a mutual understanding had been reached on all issues (Municipality of Casimir, Jennings and Appleby, Board File No. 0630-77-U).

The requirement that there be full and informed bargaining is an approach that looks primarily to the manner in which negotiations are conducted rather than to the relative merits of the bargaining proposals. Although it must be recognized that there is bound to be some relationship between the manner in which negotiations are conducted and the content of bargaining proposals, the Board has taken the position that its role in administering section 14 is to complement the existing bargaining process rather than to supplant it by adopting the role of the interest arbitrator. It is only when the content of bargaining demands is itself illegal that the Board would be concerned with the content of negotiations. The problem of illegal demands has not been presented directly to the Board during the last years, although on one occasion the Board did comment that "an insistence during bargaining upon a provision that, if accepted, would give rise to an illegality amounts to a breach of the duty to bargain in good faith". [A.N. Shaw, [1976] OLRB Rep. Sept. 504.]

The emphasis placed upon the manner of bargaining is also reflected in the exercise of the Board's jurisdiction to remedy a failure to bargain in good faith. The Board's remedial approach was discussed at some length in two Ottawa Journal decisions, [1977] OLRB Rep. June 309, [1977] OLRB Rep. Nov. 748, in which three aspects were emphasized. First, the remedy is civil in nature rather than being punitive. The Board's concern here is with fashioning a remedy that will improve the bargaining relationship rather than to punish the parties. A second aspect of the remedial jurisdiction, therefore, is that it is essentially preventive, requiring a complaining party to act expeditiously in seeking redress from the Board.

A third aspect of the remedy, and perhaps the most important, is that the remedial jurisdiction is not exercised in such a way as to redress an imbalance in bargaining power. As a result, in the

Ottawa Journal case, the Board refused to impose contractual terms that might have been reached had there been no failure to bargain in good faith and, as well, refused to compensate the locked-out employees for wages and other employment benefits lost during the lock-out that had occurred. In the Board's view, both of these remedies were inconsistent with the scheme of the Act as they would serve to supplant the collective bargaining process itself. The Board did indicate, however, that damages for the extra negotiating costs flowing from a breach of the duty to bargain in good faith might be an appropriate remedial response, although declining to do so in the particular circumstances of the case. The message from the Ottawa Journal case should be clear - parties attempting to obtain a collective agreement must negotiate rather than litigate.

These remarks were intended to provide you with a view of the duty to bargain in good faith from

the perspective of the labour board. I expect that you will now be hearing some interesting views coming from different vantage points. Before I conclude, let me make one final point. The development of the duty to bargain in good faith must necessarily be on a case-by-case basis. Although during the past three years the Board has developed a substantial body of case law relating to bargaining complaints, the jurisprudence is by no means complete. As future cases arise other facets of the duty to bargain in good faith will be explored and defined by the Board, and I expect that these decisions will provide the material for future conferences on this interesting question.

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Carter, Donald D.
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